RHB Bank Bhd v Ya'akob bin Mohd Khalib @ Abdul Ghani bin Muhammad

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D–02–613 OF 2004

GOPAL SRI RAM, ZAINUN ALI AND HASAN LAH JJCA

2 NOVEMBER 2007

Statutory Interpretation — Retrospective operation — Statutes dealing with substantive rights — No retrospective effect unless clearly indicated in statute

The respondent charged his land to the appellant as security for an overdraft facility. The respondent defaulted in payment and the appellant applied for an order for sale of the respondent's property. The appellant claimed the respondent owed the appellant a sum of RM116,774.89 made up of a principal sum of RM20,000 and the balance being interest on the principal sum. On the hearing date, a representative of the Official Assignee informed the court that the respondent was a bankrupt. The High Court judge granted the order for sale but he also decided that the amount due to the appellant was only the principal sum of RM20,000. The plaintiff's claim for the interest on the principal sum was not allowed by virtue of s 8(2A) of the Bankruptcy Act 1967 (the Act), ie, the appellant did not realize its security within six months from the date of the receiving order made against the respondent. The respondent was made a bankrupt on 24 November 1986. The charge over the respondent's land was registered on 29 December 1986. Section 8(2A) of the Act came into force on 17 July 1992. The appellant's application for an order for sale was made on 30 September 2002. The High Court granted the order for sale on 17 May 2004.

Held, allowing the appeal:

By virtue of subsection (2) of s 8 of the Bankruptcy Act the plaintiff had acquired a right as a secured creditor to realize its security when the land was charged to the plaintiff on 29 December 1986. As such the law applicable to the plaintiff was the law as it was on 29 December 1986. Subsection (2A) which was introduced by the Bankruptcy (Amendment) Act (Act A 827) and which came into force on 17 July 1992 could not, therefore, take away the plaintiff's accrued right under s 8(2) as the amending Act did not clearly and specifically provide that that subsection (2A) would have a retrospective

effect. It was therefore not intended to have a retrospective effect. To read otherwise it would produce an unjust result as that subsection (2A) deals with a substantive right (see para 11).

[Bahasa Malaysia summary

Responden telah mencagarkan tanahnya kepada perayu sebagai jaminan bagi kemudahan overdraf. Responden mungkir dalam pembayaran dan perayu telah memohon untuk satu perintah jualan harta tanah responden. Perayu menyatakan bahawa responden berhutang kepada perayu sejumlah RM116,774.89 terdiri daripada jumlah prinsipal berjumlah RM20,000 dan bakinya adalah faedah ke atas jumlah prinsipal. Pada tarikh pendengaran, wakil daripada Pegawai Pemegang Harta telah memberitahu mahkamah bahawa responden adalah seorang yang bankrap. Mahkamah Tinggi membenarkan perintah jualan tetapi beliau memutuskan bahawa jumlah terhutang kepada perayu adalah hanya jumlah prinsipal berjumlah RM20,000. Tuntutan plaintif untuk faedah ke atas jumlah prinsipal tidak dibenarkan berdasarkan kepada s 8(2A) Akta Kebankrapan 1967 ('Akta'), iaitu perayu tidak sedar jaminannya dalam tempoh enam bulan daripada tarikh menerima perintah yang dibuat ke atas responden. Responden telah dijadikan bankrap pada 24 November 1986. Gadaian ke atas tanah responden telah didaftarkan pada 29 Disember 1986. Seksyen 8(2A) Akta berkuatkuasa pada 17 Julai 1992. Permohonan perayu untuk perintah jualan dibuat pada 30 September 2002. Mahkamah Tinggi membenarkan perintah jualan pada 17 Mei 2004.

Diputuskan, rayuan dibenarkan:

Menurut subseksyen (2) s 8 Akta Kebankrapan plaintif telah memperolehi hak sebagai pemiutang bercagar untuk merealisasikan jaminannya semasa tanah yang dicagar kepada plaintif pada 29 Disember 1986. Oleh itu undang-undang yang terpakai kepada plaintif adalah undang-undang yang mana ianya adalah 29 Disember 1986. Subseksyen (2A) yang diperkenalkan oleh Akta Kebankrapkan (Akta A 827) dan yang mana berkuatkuasa pada 17 Julai 1992 oleh itu tidak boleh membawa pergi hak terakru plaintif di bawah s 8(2) sebagaimana pindaan akta tidak secara jelas dan spesifik menyediakan bahawa sub-s (2A) mempunyai kesan kebelakangan. Oleh itu ianya tidak bermaksud mempunyai kesan kebelakangan. Untuk membaca secara sebaliknya ianya akan menghasilkan keputusan yang tidak adil yang mana subseksyen (2A) berurusan dengan hak substantif (lihat perenggan 11).]

Notes

For cases on retrospective operation generally, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2099–2112.

Cases referred to

Public Bank Bhd v Khaliddin bin Busu [1998] MLJU 293 (refd)
Sim Seoh Beng v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (refd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1 (refd)

Legislation referred to

Bankruptcy Act 1967 s 8(2A)
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 29 r 1(2B)

Appeal from: Originating Summons No 24–232 of 2002 (High Court, Kota Bharu)

James Selvamuthu (Ong Kok Bin & Co) for the appellant.
Shamsul Zakri (Senior Federal Counsel, Official Assignee's office) for the respondent.

Gopal Sri Ram JCA:

[1] I have read the judgment of my learned brother Hasan bin Lah in draft and I agree with the reasons he has given for allowing this appeal.

Hasan Lah JCA (delivering judgment of the court):

[2] This was an appeal by the plaintiff against the decision of the learned trial Judge who disallowed the plaintiff's claim for payment of interest on the principal sum in a charge action. We allowed the appeal at the conclusion of the arguments. I now give my reasons for doing so.

[3] The facts of the case were not in dispute. By originating summons the plaintiff applied for an order for sale of the defendant's land which was charged to the plaintiff as a security for an overdraft facility after the defendant defaulted in payment. According to the plaintiff the defendant owed the plaintiff a sum of RM 116,774.89 as at 31 July 2002 which was made up of the principal sum of RM20,000 and the interests on the said principal sum. On the date of the hearing of the said originating summons a representative from the office of the Official Assignee informed the court that the defendant was a bankrupt. The learned judge allowed the application for sale of the charged land but he also decided that the amount due to the plaintiff as a chargee was only the principal sum of RM20,000. He did not allow the plaintiff's claim for the interest on the principal sum by virtue of s 8(2A) of the Bankruptcy Act 1967.

[4] That s 8(2A) came into force on 17 July 1992. The defendant was made a bankrupt on 24 November 1986. The plaintiff's originating summons was filed on 30 September 2002. The learned trial judge was of the view that as the plaintiff did not realize its security within six months from the date the receiving order was made against the defendant the plaintiff was not entitled to the interest on the principal sum. Notwithstanding the fact that the defendant was adjudged a bankrupt before the coming into force of that subsection (2A) the learned judge held that that subsection (2A) applied to the plaintiff.

[5] Before us the learned counsel for the plaintiff submitted that that s 8(2A) of the Bankruptcy Act was not applicable to the plaintiff as that subsection had no retrospective effect.

[6] The facts of the case clearly showed that the defendant was declared a bankrupt on 24 November 1986. That s 8(2A) of the Bankruptcy Act came into force on 17 July 1992. The charge over the defendant's land was registered on 29 December 1986 which was after the defendant was declared a bankrupt. The High Court granted the order for sale of the said land on 17 May 2004. Subsection (2) and (2A) of s 8 of the Bankruptcy Act provide:

> (2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed - nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of the provisions of s 31 of the Employment Act 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.
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> (2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

[7] On the facts of this case I was of the view that there was merit in the submission of the learned counsel for the plaintiff. It is my judgment that that s 8(2A), with respect, did not have a retrospective effect. I find support for my view in the decision of the Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1.

[8] In *Yew Bon Tew*'s case the appellants brought an action in March 1975 for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972 between a motor bus belonging to the respondents and a motorcycle ridden by the first appellant with the second appellant as pillion passenger. Section 2(a) of the Public Authorities

Protection Act 1948, which applied provided that action shall not lie or be instituted unless it is commenced within twelve months after the act complained of.

[9] With effect from June 1974, this provision was amended to substitute 'thirty six months' for the 'twelve months'. On 20 March 1975 the appellants issued a writ for damages for personal injuries. The respondents filed a defence in which they pleaded that the appellants were barred from bringing the action by virtue of the Public Authorities Protection Act 1948. The learned trial judge decided in favour of the appellants but on appeal the Federal Court held that the time for the claim in this case was not enlarged by the amending act, which had no application to a cause of action which was barred before the amending act came into operation. The appellant appealed to the Yang Di-Pertuan Agong. The Privy Council, in dismissing the appeal, held that an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. In this case the respondent acquired a right when the period prescribed by the 1948 Ordinance expired, and this was not taken away by the 1974 amending Act. At p 3 Lord Brightman said:

> Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute. The sort of problem which can arise is neatly illustrated by the case of '*The Ydun*'s). This was an action by the owners of the barque '*Ydun*' against the Corporation of Preston. On 13 September 1893 the barque went aground owing to the alleged negligence of the Preston Corporation, which was the port authority. On 5 December 1893 the Public Authorities Protection Act was passed. It came into force on 1 January 1894. It had the effect of curtailing the period of limitation applicable to the institution of proceedings in such an action from six years to six months. The position therefore at the date of the accident was that the owners had until September 1899 to issue their writ; but on 1 January 1894, if the Act applied to this cause of action, they had only until March 1894. The owners issued their writ in November 1898. By the time the case reached the Court of Appeal there were two issues, first whether the Corporation had been acting in pursuance of its public duties when the accident took place and was therefore entitled to the protection of the Act; and secondly whether the Act applied to a cause of action which had already accrued when the Act came into force. The second issue was decided against the owners, and was disposed of in the judgments with remarkable brevity for so important an issue. AL Smith LJ expressed himself as follows (at p 245):
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> > The rule applicable to cases of this sort is well stated by Baron Wilde in *Wright v Hale* [1860] 6 H & N 227, 232, namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of

> action is not taken away. But when the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.

Vaughan Williams LJ was to the same effect (at p 246):

> I also agree that the Act is retrospective... There is abundant authority that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts.

[10] In *Public Bank Bhd v Khaliddin bin Busu* [1998] MLJU 293 a receiving order was made against a chargor of land ie, the defendant on 17 June 1991 which was before the coming into force of s 8(2A) on 17 July 1992. The charge over the defendant's land was registered on 29 August 1983. The plaintiff filed the originating summons for an order for sale of the defendant's land on 6 November 1997. One of the issues raised in that case was whether s 8(2A) was intended to have retrospective effect. Faiza Tamby Chik J, after referring to the decision of the Privy Council in *Yew Bon Tew*'s case, held that s 8(2A) was not intended to have retrospective effect.

[11] In *Sim Seoh Beng v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 the issue was whether O 29 r 1(2B) of the Rules of the High Court 1980 applied retrospectively. The Court of Appeal held that it was not retrospective. Gopal Sri Ram JCA at p 297 stated that:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.
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> We derive support for the view that we have expressed from the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (also reported in [1983] 1 MLJ 1).

[12] In the instant case by virtue of subsection (2) of s 8 of the Bankruptcy Act the plaintiff had acquired a right as a secured creditor to realize its security when the land was charged to the plaintiff on 29 December 1986. As such the law applicable to the plaintiff was the law as it was on 29 December 1986. Subsection (2A) which was introduced by the Bankruptcy (Amendment) Act (Act A 827) and which came into force on 17 July 1992 could not, therefore, take away the plaintiff's accrued right under s 8(2) as the amending Act did not clearly and specifically provide that that subsection (2A) would have a

retrospective effect. It was therefore not intended to have a retrospective effect. To read otherwise it would produce an unjust result as that subsection (2A) deals with a substantive right.

[13] For the reasons indicated this appeal was allowed with costs. It was ordered that the appellant was at liberty to prove its claim in the estate of the bankrupt. The costs for the appeal was also ordered to be taxed and proved against the bankrupt's estate. The deposit of this appeal was ordered to be refunded to the appellant.

[14] My learned sister, Zainun binti Ali JCA, has seen this judgment in draft and has expressed her agreement with it.

Appeal allowed with costs.

Reported by Brendan Navin Siva